for The Defense

The Training Newsletter for the Maricopa County Public Defender's Office

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Dean W. Trebesch, Maricopa County Public Defender

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1992 AND 1993: A VIEW FROM THE TOP

By Dean Trebesch

1992 barely started, it seemed, and now it's already 1993! Thinking back, it was a year with mixtures of good news and not-so-good news for the office.

The not-so-good news was our budget. After taking a 3 percent cut in July of 1991, we were directed by the County to absorb an emergency budget reduction of 5 percent in January 1992 and a 3 percent reduction in July for fiscal year 92-93. It impacted our programs and our personnel.

Nevertheless, we held our own through this difficult period. Actually, we distinguished ourselves, in my opinion, by saving over $100,000 for the County by voluntarily taking time off without pay or working without pay over the first six months of 1992. To me, that feat is nothing short of incredible and speaks wonderfully about the commitment the people in this office show at every opportunity. And, while our caseloads were not what we want them to be and our vacancies weren't filled as quickly because of these budgetary influences, neither the quality of our service nor our collective morale appreciably diminished over these difficult months.

1992 demonstrated, once again, that our employees are our best resource, and will do whatever it takes to assure the delivery of quality legal services to our clients.

In 1992, our training program and our client services program won national recognition for innovation and quality. Important, also, was the fact that throughout the year laudatory comments were regularly received from judges, clients, family members, and court personnel regarding the high (and improving) caliber of our attorneys and technical support personnel. Your advocacy, trial skills, professionalism, and commitment to your clients has been recognized time and again. Our office's first "Client Relations" seminar, which focused on a client-centered, quality service approach to every aspect of our practice, became a key aspect of our development as an office.

A broad-based group of office personnel initiated a comprehensive review of existing file records procedures and computer assistance. As a result, improvements in procedures and efficiencies have been ongoing.

Our heralded Motion and Brief Bank project became operational, and should save countless hours of research as well as improve the quality of our motion work.

The long-awaited Hay Study became reality, and equitably adjusted the salaries of many of our employees, demonstrating again that our employees had worked long and hard without adequate compensation or recognition. As the year concluded, phase two was being put in place for early 1993.

What awaits us in 1993, however?

First, it is apparent that our round of budget cuts can no longer continue or our level of service will be harmed, to the detriment of our clients. The office needs an infusion of new programs, instead of a budgetary-induced trend toward skeletal staffing. More grants will be applied for to develop such program ideas. Efforts will be made to bolster our client services program, and once again we will attempt to commence a litigation assistant pilot project, designed to provide specialized assistance to trial attorneys on trials or complex cases. In the months to come the office will increasingly reach out to the Bar and the courts in a concerted effort at bringing caseloads and funding in line with acceptable standards.

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Our quest to provide the maximum level of quality representation to every client will again be our overriding objective. Toward that objective, we will focus on significantly enhancing our staffing in the mental health unit of our office to match its sudden and huge influx of extra cases. Furthermore, starting this month the office will take all necessary steps to assure the right to private and meaningful consultations with our clients at all justice courts, most notably the JCFC. Moreover, increased attention will be given, in various ways, to the "critical stage" nature of preliminary hearings and the adversarial role our attorneys must play at these appearances. As expected, training will continue to be a valuable tool for development of all our staff. Included in our training objectives will be the hosting of our first Trial Advocacy College.

These are but a few of our key objectives for the year. Their focus is on strengthening our client relations, our advocacy skills, our professionalism, and our image as an office. Just as important, though, is our desire to seek improved rewards and recognition for those employees who contribute and excel in their performance.

Thank you for your help throughout 1992 and for demonstrating, by your daily efforts, that this is more than just a job or a place to simply go to work. A blending of hard work, office camaraderie and an "obsession" to zealously serve our clients continue to make this a rewarding place for all of us. ^

FOR THE DEFENSE

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

Nota del Redactor:
Sentimos informar a ustedes que un error apareció en nuestro periódico de diciembre en la página ocho. El Señor Larry Matthew no habla Español con fluidez. Nos disculpamos por cualquier dificultad que este error haya causado.

(Editor's Note:
We are sorry to report that an error appeared in our December newsletter on page 8. Larry Matthew does not speak Spanish fluently. We apologize for any problem this error caused.)

Case File Documentation

By Thomas E. Klobas

Imagine if you will the following scenario:

You are seating yourself in the courtroom witness chair. You are here because a former client of yours has filed a Petition for Post-Conviction Relief under Rule 32 in which he is alleging that your representation of him was ineffective. As you glance around the courtroom, you see your ex-client with an all too familiar smirk on his face. Seated next to him is his attorney whose countenance bears a startling resemblance to a starving person confronting a filet mignon.

Across the aisle sits the deputy county attorney. You are not comforted by the thought that in the proceeding, the county attorney will be your defender. You are certain that every soul in that courtroom has taken note of the deer-in-the-headlights look you feel you must be displaying.

When you received that subpoena calling you to appear at this hearing, you took the trouble to retrieve your old file on this case in the hope that it might refresh your recollection. You found it to be a jumble of minute entries, coffee-stained police reports, telephone call slips, drafts of filed and unfiled motions, speed letters, highliter-marked transcripts, and semi-readable notes which may or may not be related to the case. Finally you noted that the all important case log remained in nearly mint condition, not marred by all those entries you meant to put in but didn't get around to doing so. Lost forever are those records of jail visits, telephone calls, plea negotiations, client comments, and investigation efforts that you just know will be the subject of the next hour of your life. You are by every standard EXTREMELY uncomfortable.

While Petitions for Post-Conviction Relief have always been part of the legal landscape, they have taken on an added dimension due to the recent amendments to Criminal Rules 17, 26 and 32. Those changes, which became effective on September 30, 1992, stripped away the right to appeal from any case in which the defendant either pled guilty or no contest, or entered an admission to a violation of probation. A Rule 32 petition is now the client's only recourse. Since the vast majority of criminal cases result in either pleas or admissions, it is expected that Rule 32 hearings will become increasingly familiar events.

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While they now are meant to substitute for appellate practice, Rule 32 proceedings operate under wholly different guidelines. For purposes of this article, a key difference is that the basis for requesting relief is not limited to the court record. Therefore, in determination of ineffective assistance, there will be an effort by the PCR attorney to examine the work product of the trial attorney, and our office has already received a number of such requests. Once the former client has provided a written waiver of confidentiality with regard to his former representation, there seems little that can be done to bar the PCR attorney from our file.

Ethical Rule 1.6(d) establishes that once the PCR attorney has filed a claim of ineffective assistance, confidentiality is automatically waived "to the extent the [former] lawyer reasonably believes necessary to establish a claim of defense on behalf of the lawyer." The dilemma of the PCR attorney is that Rule 32 requires that any claim of ineffective assistance must first meet the test of being "colorable" before it can be heard--thus the need to examine the prior attorney's work to ascertain if such a claim exists.

There are two primary commandments preached as part of the Public Defender liturgy: "Only waive prelims if there is a demonstrable benefit to the client" and "Document your work in the case log." Having myself been the "star witness" at two PCR hearings, I can give personal testimony as to the wisdom of the latter. But what if the case log is devoid of entries, or only marginally complete? Can an attorney merely testify on the basis his or her "customary procedure or practice?"

In *State v. Cuffle*, 171 Ariz. 49, 828 P.2d 773 (1992), the Supreme Court commented upon a situation in which the former attorney had responded to a claim of ineffective assistance by testifying based upon his "customary practice rather than a specific or independent recollection of his discussion with [the] appellant about the charges." While the Court expressed no criticism of the attorney, it did mention that his testimony concerned an event which had occurred "a number of years" in the past. It remains to be determined if courts will be as forgiving when testimony relates to a much more recent event. Because of the limited interval within which our clients are now permitted to file a PCR petition, we can anticipate that the bulk of such hearings will take place within months, not years, after representation has terminated.

The object of all this is clear. Those few moments you take to jot down such matters as phone calls, jail visits, investigatory leads, plea negotiation progress, client comments and reactions, and case progress in general may buy you hours of sleep as you prepare to testify regarding your representation. In fact, it will probably let you avoid the whole bloody experience altogether! ^

Practice Tips:

MCLE Rule Change

Practitioners take note. Rule 45 for Mandatory Continuing Legal Education has been amended. Effective July 1, 1993, "[a] minimum of 3 hours" annually will be required for MCLE in ethics. The previous requirement was for 2 hours of ethics CLE credit every year.

Additionally, an affidavit of compliance for Rule 45 will be filed every year by each practitioner (not exempted). Previously, a complex schedule required compliance on a staggered basis each third calendar year. The affidavit must be filed by September 15th. You must also, according to the recent changes to Rule 45, maintain records for MCLE for a period of 2 years following the filing of an affidavit.

Ten Good . . . .!

By Christopher Johns

This is our first newsletter of the "new year." Traditionally, the beginning of the year is a time to make improvements, e.g., lists of things to do differently or better for the new year. The Practice Tips section is devoted to new ideas about zealous advocacy, "good" practices, and most importantly, sharing information about how to provide the best quality representation we can for our clients.

With that in mind, the following are some lists of 10's for 1993. Some, hopefully, are just plain good practice and common sense. Some, are probably more work and require a devoted sense of being conscientious on every case. Some, are downright zealous representation---the kind that exemplifies what the Sixth Amendment is all about. Well, you get the point:

10 Reasons To Put On Preliminary Hearings

1. It is a critical stage of the proceedings where the accused is entitled to "effective" representation of counsel. *Coleman v. Alabama*, 90 S.Ct. 1999 (1970).

2. If there is no substantial benefit for the client in waiving the preliminary hearing, e.g., a beneficial waiver with plea, it is good practice to put on the hearing.

3. A transcript is generated that is under oath,which is far more effective for impeachment purposes.

4. Cross-examination, and other courtroom skills may be enhanced, practiced and honed where a mistake is least likely to damage the case.

5. It provides bargaining power, i.e., the government must be taught there is a price to pay for not coming to a reasonable disposition at the earliest possible time.

6. If a client sees that you are providing assertive, sound, and constitutionally required advocacy at this earliest of critical stages (you are fighting for him or her), he or she is more likely to respect you and consequently take your advice in later phases of the case.

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7. In Rule 11 cases, the client cannot knowingly and intelligently waive the preliminary hearing. Submitting it on the DR's requires the client's acquiescence (also) and is no substitute for testimony under oath that may further enhance the bases for psychiatric examinations.

8. It's good practice.

9. Real lawyers do it.

10. You might win.

10 Things To Do In Every Case

1. Visit the in-custody client as soon as possible, or have an out-of-custody client visit you as soon as possible.

2. Schedule interviews at the earliest possible date for defense witnesses and the state's witnesses.

3. Develop a theory of the case and a defense (try reviewing possible jury instructions at the very beginning of the case to see what they will be).

4. Investigate, including visiting the crime scene.

5. Obtain mitigating evidence for the client from Day One.

6. Review any collateral court or office files (other cases, juvenile cases or mental heath cases; especially read previous presentence investigation reports of clients).

7. Determine whether a conflict exists as soon as possible.

8. Always perform a Rule 8 calculation before entering into a plea agreement or proceeding to trial to insure that it has not been violated.

9. Always review the grand jury transcript and preliminary hearing transcript for a redetermination of probable cause.

10. Always check the final minute entry to determine whether the court sentenced the client in accordance with the plea or applicable statutes, and determine whether the client has been given proper credit for presentence incarceration.

10 Reasons To Schedule Your Own Interviews

1. Witnesses (excluding victims), including police officers, *do not belong* to the prosecution.

2. Interviews may be set at *your* convenience.

3. It is *unethical* (ER 3.4) for the prosecutor to suggest you may not interview someone other than a victim, and including a police officer, unless they are present. Prosecutors have no right to be present for your interviews (except victims).

4. Witnesses generally are more comfortable and candid with fewer people, and, if you have established a rapport, are more likely to divulge information to assist the client.

5. Interviews may be set early in the case so that you do not let the state dictate the pace of your case investigation and effectiveness as an attorney.

6. Impeachment material may not have to be turned over to the state. Hence, you have a leg up.

7. Prosecutors interview witnesses and police officers all the time and do not invite defense attorneys--why should we invite them?

8. It gives the defense attorney some control of the case.

9. If "bad" evidence is obtained, you know sooner how to proceed with the case; and, you are much more likely to obtain *Brady* material and learn that it has been either inadvertently or intentionally hidden from the defense.

10. It's better practice and that's how the best criminal law practitioners do it.

10 Things To Always Put In Any Case File

1. Documentation of every telephone call or visit with client.

2. Documentation of every significant development in the investigation of the case, particularly of witnesses provided by the client.

3. The date and time of each and every court setting for the case.

4. All minute entries.

5. Copies of each and every motion filed in the case.

6. Memos to the file documenting the progress of the case.

7. Copies or the originals of all tape recordings, transcripts of tape recordings, and photographs taken in the case.

8. The names of the prosecutor, judge, and any other significant personnel involved in the case.

9. Any other documents provided by the client or others important to the case.

10. A copy of the presentence report (if not a dismissal or acquittal at trial), final minute entry and confidential criminal history.

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10 Motions To Consider Filing In Every Case

1. Motion for redetermination of probable cause.

2. Motion for severance of counts or defendants.

3. Motion to suppress evidence illegally obtained under the Fourth Amendment.

4. Motion for evidentiary rulings on prejudicial evidence (motions *in limine*) pursuant to Rule 104, Ariz. R. Evid. (preliminary questions of admissibility).

5. Motion for the state to provide a separate list of witnesses as required by Rule 15.

6. A specific and separate request for *Brady* material.

7. Request for individual voir dire and/or jury questionnaire.

8. Request for rebuttal witnesses.

9. Motion challenging the voluntariness of statements by the client.

10. Motion for specific discovery (no form motions, please).

10 Extra Questions To Ask Police Officers In Interviews

1. How many other reports have been prepared in this particular case?

2. How many times have he or she and the prosecutor talked about the case and what was the nature of the discussion(s)? (It is not privileged.) Note, generally in federal courts, prosecutors may not use a trial subpoena as a vehicle for questioning a witness outside the courtroom. *See* Fed. R. Crim. P. 17; *U.S. v. Nixon*, 418 U.S. 683 (1974) (some state prosecutors subpoena officers for office interviews). If you did not schedule the interview for your office, ask the officer how it was that he was contacted for the interview and if he was commanded to bring any documents.

3. How many times has the officer testified in court before, and what was the nature of training at the academy regarding testifying (to show officer is a professional witness)?

4. How many times and for what has the officer been disciplined previous to this case? (It is discoverable!)

5. Were any notes prepared before writing the DR and why were they destroyed?

6. Does the officer dislike your client?

7. If there were no rules of evidence, is there anything else the officer would like to tell the jury if he were allowed to?

8. If there were statements from the client, why didn't the officer tape-record or videotape them?

9. What evidence, in his opinion, tends to show the client is not guilty?

10. Why did he or she become a police officer?

10 Issues To Litigate In Victims' Rights Cases

1. A.R.S. Sec. 13-4433 is overbroad because it attempts to regulate pure speech and therefore violates the First Amendment.

2. A.R.S. Sec. 13-4433(B) is vague because the term "promptly" is subject to arbitrary and caprious enforcement.

3. The "opt-in" system for victims' rights is a violation of the Fourteenth Amendment equal protection clause because poor victims are disproportionately blacks and Hispanics (i.e., protected classes), and the present system favors educated and more affluent crime victims.

4. In-custody clients are denied certain victims' rights, and they are disproportionately blacks and hispanics and therefore a protected class.

5. Notwithstanding *State v. Warner*, 168 Ariz. 261 (App. 1990), practitioners may preserve for the record on cases before the adoption of victims' rights that it is a violation of the *ex post facto* clauses of the U.S. and Arizona Constitutions.

6. Sequestering witnesses (alleged victims) is a denial of due process of law since it gives the government an unfair advantage.

7. Victims' rights violates the reciprocal discovery holding of *Wardius v. Oregon*, 412 U.S. 470 (1973) and is therefore unconstitutional in violation of the Sixth and Fourteenth Amendments.

8. It is unethical for a prosecutor (or agents of the prosecutor) to instruct a witness not to speak with opposing counsel.

9. Excessive warnings by prosecutors to alleged victims sympathetic to the accused that they will be prosecuted for perjury or some other misconduct may violate the defendant's Sixth Amendment right.

10. Alleged victims are entitled to a lawyer if they can afford one; however, poor victims, which may be disproportionately black or hispanic, are denied equal protection under the law.

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10 Characteristics Of A Top Public Defender Office

1. The office demonstrates an unqualified commitment to *training* at all levels.

2. The office is dedicated to the hiring, retention, promotion and training of the best *personnel*.

3. A top public defender office has attorneys that are *committed* to protecting the rights of our clients threatened or violated by police, prosecutors, and the court.

4. There must be a dedication by administration and staff to provide *comprehensive* services, e.g., client service coordinators, investigators and other support services.

5. There must be *communication* at all levels of the problems and issues being confronted by attorneys and attempts to resolve them, e.g., communication may be enhanced by memos, trial group meetings and newsletter articles.

6. There should be a sense of *camaraderie*. We are all in this together and need to help one another accomplish our goal.

7. There must be a goal of delivering quality legal representation, not for some, but for all of our clients on a *consistent* basis.

8. There must be *zealous advocacy*. Our work is controversial and our clients unpopular. Our goals are often contrary to every other agency in the justice system. Zealous advocacy means toes are going to be stepped on. This is not a job for the faint-hearted.

9. Understanding and *respect* for our clients is necessary for a top public defender's office. Many of our clients have lived horrible lives. We need to understand that they still need to be respected as human beings. The guilty also deserve the best representation possible.

10. A *shared vision* of being the best is necessary, and a desire to win. We need to think of ourselves as the best criminal lawyers in the state, providing the best services, and for the most noblest of reasons: the preservation of the Bill of Rights.

2 More Reasons to Schedule & Conduct Your Own Interviews

1. It's on your own turf.

2. You can control the surroundings. You should conduct the interview in a conference room, if available, and not in your office (unless there is no other place). Never leave files open unless done for strategic reasons.

Working For The Client At Sentencing

The Client's Own Child Abuse As A Mitigating Factor

In the recent Ninth Circuit case of *U.S. v. West*, No. 91-30085, the court held that child abuse may be a mitigating factor under the Federal Sentencing Guidelines. The Fifth Circuit, in *U.S. v. Vela*, 927 F.2d 197, has previously held that the defendant's history of abuse was not so extraordinary as to warrant a reduced sentence.

In *West*, the defendant, convicted of bank robbery, had grown up in an atmosphere of savage and daily beatings, sexual abuse and sadism. Expert testimony chronicled the abuse and noted that the defendant had been so severely abused that she was virtually "a mindless puppet."

Similarly, the Eighth Circuit has held that spousal abuse may be a mitigating factor in sentencing. *See U.S. v. Desomeaux*, 952 F.2d 182 (1991).

While Arizona does not have sentencing guidelines, these cases may serve as persuasive authority for mitigation in particularly bad cases in addition to any other factors found in A.R.S. Sec. 13-702.

Mere Arrests Are Not Aggravating Factors

In a case handled on appeal by Larry Matthews [*State v. Romero*, 126 Ariz. Adv. Rep. 32 (CA 1, 11/19/92)], the court has also made it clear that a "trial court may not aggravate a sentence 'based on the mere report of an arrest with no evidence of the underlying facts to demonstrate that a crime or some bad act was probably committed by the defendant.'" *Romero* involved a case where the sentencing judge said on the record that he was using the defendant's "extensive criminal history" as an aggravating factor. The court also noted that the defendant's only prior conviction was over 19 years old and that A.R.S. Sec. 13-702(D)(11) specifies that the trial court shall consider, as an aggravating factor, whether the defendant was "previously convicted of a felony within the ten years immediately preceding the date of the offense."

Alternative Sentencing Enjoys Public Support

Along a different line, practitioners may also want to point out to the court that four out of five Americans support community punishment programs over prison for non-dangerous offenders. That's according to a September 1991 national survey conducted by the Wirthlin Group. The survey, sponsored by the International Association of Residential and Community Alternatives, found 35% are strongly in favor and 45% are somewhat in favor of non-prison programs in which non-dangerous criminal offenders are required to hold a job, perform community service, repay victims, and receive counseling.

Challenging Horizontal Gaze Nystagmus

By Gary Kula

The controversy surrounding the Horizontal Gaze Nystagmus (HGN) test is far from over. Proponents of the test insist that it is the best thing that's come out of NHTSA's studies in many years. Critics recognize the validity of HGN as a scientific testing method, but question whether police officers possess the expertise to administer it correctly, understand its results or use it to accurately predict impairment or BAC levels.

While there have been cases which have reviewed the use of the HGN test since the Arizona Supreme Court's landmark decision in *State of Arizona v. Superior Court (Blake, Real Party In Interest)*, 149 Ariz. 269, 718 P.2d 171 (1986), it is important that defense counsel continue to ask the courts to re-examine the use of the HGN test in light of the many studies, scientific articles, and court decisions in other jurisdictions which have called into question the roadside use of the HGN test by police officers.

For example, in July of this year, the Supreme Court of Kansas handed down an opinion which noted the disagreement that can be found within the scientific community as to the research methodology behind the HGN test, as well as the accuracy of the test itself. More specifically, after reviewing recent studies, research and court decisions on the roadside use of the HGN test, the Supreme Court for the State of Kansas stated, "If the Arizona Superior Court had had this evidence before it, it may not have held that HGN evidence satisfies the *Frye* admissibility requirements." *State of Kansas v. Witte*, 251 Kansas 313 (Kansas, filed July 10th, 1992).

In reviewing the appendix to the *Blake* decision, the Court noted the one-sided nature of the materials relied upon by the Court in *Blake*, cited the lack of materials and witnesses presented by the defense, and stated, "In addition to its testifying witnesses, the state submitted seven publications, including scientific reports and NHTSA studies. The defendant, on the other hand, presented no evidence to counter the state's expert witnesses or to dispute the State's publications." (*Witte*). In light of the *Witte* decision, as well as the wealth of scientific studies and research which has been developed subsequent to the Arizona Supreme Court's holding in *Blake*, it appears that it may be time for the Arizona Supreme Court to reconsider the use of the HGN test in Arizona.

The purpose of this month's article is to provide you with basic background information on the HGN test, the certification process used in Arizona and the relevant case law on the use of the HGN test. In next month's newsletter, we will discuss ways in which defense counsel can deal with HGN testimony at trial.

I. HGN: Background Information

There are approximately 45 different types of nystagmus. Testing for nystagmus is well accepted within the scientific community as a way of diagnosing various types of diseases, disorders, and illnesses. In order to determine the type of nystagmus present, medical professionals, including neurologists, pharmacologists and ophthalmologists, use specialized training and sophisticated equipment; only then are they able to reach a conclusion as to the presence of nystagmus and its significance. The use of the HGN test to detect drunk drivers began to gain widespread acceptance following research conducted by the Southern California Research Institute (SCRI). Their studies were funded by the National Highway Traffic Safety Administration (NHTSA). The purpose of the research was to develop a standardized series or battery of field sobriety tests to be used by police officers in the detection of drunk drivers. SCRI determined that the most accurate battery of field sobriety tests included the walk and turn test, the one-leg stand test, and the HGN test.

It is important to note that while many courts will cite the SCRI studies in approving the use of the HGN test, those same courts are often not aware that very detailed procedures and guidelines were outlined in the SCRI studies for the administration of the HGN test. Careful scrutiny should be undertaken by the defense attorney to determine whether or not the police officer has been trained to administer, or did administer, the HGN test in a manner which is consistent with the specific provisions outlined in the SCRI studies. If the courts are going to rely on the SCRI studies to support the use of the HGN test and allow HGN evidence to be admissible at trial, then the courts should not allow police officers to use their NHTSA certification as a shield when they fail to administer the HGN test in accordance with the detailed instructions contained in the SCRI studies.

II. HGN: Officer Certification

The requirements for HGN certification are outlined in the lower court decision in the *Blake* case (149 Ariz. 287, 718 P.2d 189 (App. 1985)). The certification requirements include:

1) Officer must receive a minimum of 20 hours of instruction;

2) A minimum of 35 subjects must be tested *prior* to certification;

3) The officer must maintain an 80 percent accuracy rate to be certified;

4) The officer must score a minimum of 80 percent on a final practical exam; and

5) The officer must use the HGN test regularly.

The certification agency for the HGN technician is the Arizona Law Enforcement Officer Advisory Council (ALEOAC). As part of their training, officers are given an opportunity to practice the HGN test on subjects who have been dosed with various amounts of alcohol.

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Following the classroom portion of their training, the officers must administer 35 practice tests out in the field. After 35 tests are completed, the officers take a final examination which includes the administration of the HGN test on dosed subjects. Specific information about how well the officer performed in this final test, as well as other useful information about the officer's HGN training and certification, can be found in the officer's Standardized Field Sobriety Horizontal Gaze Nystagmus Control Sheet and his Alcohol Workshop Practical Test Sheet. These sheets should be subpoenaed or obtained as part of the officer's HGN logs. They provide defense counsel with information about when the officer completed his classroom instruction, when he successfully completed the practical examination, the results of the practical examination, and information on the actual workshop practical test conducted during the course of the certification process.

Defense counsel should also obtain the officer's Student Performance Checklist on the improved sobriety tests battery. This checklist includes detailed step-by-step information and instructions for the administration of the HGN test, the walk and turn test, and the one-leg stand test. This information may be useful in the cross-examination of the police officer. Especially, if his instructions or procedures in the administration of these tests deviate from the prescribed guidelines and instructions which were part of his certification process.

III. HGN Case Law

A. Validation of the HGN test by the Arizona Supreme Court

The leading case in the State of Arizona on the use of the HGN test is *State of Arizona v. Superior Court (Blake Real Party In Interest)*, 149 Ariz. 269, 718 P.2d 171 (1986). In *Blake*, the court held: 1) In the hands of a trained officer, the HGN test is reasonably trustworthy so as to be used to help establish probable cause to arrest; and 2) The HGN test satisfies the *Frye* test for reliability and may be admitted in evidence to corroborate or attack, *but not to quantify*, the chemical analysis of the accused's blood alcohol content. It may also not be used to establish the accused's blood alcohol level in the absence of a chemical analysis of the accused's blood, breath or urine.

B. HGN to Corroborate or Challenge BAC Test Result

Where a blood alcohol concentration has been determined by a chemical analysis of a suspect's blood, breath or urine, the results of the HGN test indicating a blood alcohol content of .10% percent or greater are admissible to corroborate the chemical analysis test result. *State ex rel. McDougall v. Ricke*, 161 Ariz. 462, 778 P.2d 1358 (App. 1989).

C. The Use of the HGN Test Absent a BAC Test Result

In the case *State ex rel. Hamilton v. City Court of Mesa (LoPresti, Real Party In Interest)*, 165 Ariz. 514, 799 P.2d 855 (Ariz. 1990), the Arizona Supreme Court addressed the issue of the permissible scope of an officer's testimony as to the HGN test results in a case where there is no chemical analysis of the suspect's blood, breath or urine. In *LoPresti*, the Court held:

"Evidence derived from the HGN test, in the absence of a chemical analysis, although relevant to show whether a person is under the influence of alcohol, is only relevant in the same manner as are other field sobriety tests and opinions on intoxication. In such a case, HGN test results may be admitted only for the purpose of permitting the officer to testify that, based on his training and experience, the results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion."

LoPresti, at 859-860.

Pursuant to the court's holding in *LoPresti*, the officer may not testify as to the accuracy with which his HGN test results correlate to, or predict, a BAC of greater or less than .10 percent.

An exception to the *LoPresti* holding was recently established by the Court of Appeals, Division Two, in the case of *State of Arizona v. Cook*, 116 Ariz. Adv. Rep. 41 (filed June 30, 1992). In *Cook*, the defendant refused to take an intoxilyzer test, but agreed to submit to the HGN test. In its decision, the Court of Appeals acknowledged the limitations placed on an officer's testimony as outlined in *LoPresti*. The court went on to rule, however, that the door to allowing additional testimony by the officer may be opened if defense counsel challenges the reliability of the HGN test by questioning the officer about the accuracy standards necessary for certification. Should this happen, the court ruled that the prosecutor may then elicit testimony about the officer's actual accuracy rate in using the HGN test to predict a BAC level greater than .10 percent.

There is no question that in the hands of a trained professional, the HGN test is a very useful test. The question is whether courts will continue to allow officers, who are minimally trained by instructors who lack any specialized medical training, to testify about the results and significance of a neuro-ophthalmological test which took them less than a minute to administer alongside a busy highway. In order to meet the challenge of effectively cross-examining an officer on the HGN test, it is imperative that defense counsel be aware of the inadequacies of the certification process as well as the questions which have been raised as to the reliability of the test itself. In next month's newsletter, we will discuss these very issues. ^

December Jury Trials

November 23

Slade A. Lawson: Client charged with 2 counts of sexual abuse. Investigator G. Beatty. Trial before Judge Fields ended December 01. Client found not guilty. Prosecutor A. Williams.

(cont. on pg. 9)

Roland J. Steinle & Timothy J. Ryan: Client charged with first degree murder and theft. Investigator R. Thomas. Trial before Judge Hendrix ended December 09. Client found guilty. Prosecutor J. Ditsworth.

December 07

Eric G. Crocker: Client charged with DUI. Investigator R. Thomas. Trial before Judge Sheldon ended with a hung jury December 10. Prosecutor W. Baker.

December 08

David R. Fuller: Client charged with theft. Investigator G. Beatty. Trial before Judge Hendrix ended December 23. Client found not guilty. Prosecutor D. McIlroy.

December 09

Robert W. Doyle & Ray P. Schumacher: Client charged with 4 counts of sexual assault, 1 count of aggravated assault and 1 count of kidnapping. Investigator D. Erb. Trial before Judge Seidel ended December 16. Client found guilty on 3 counts of sexual assault, 1 count of aggravated assault and 1 count of kidnapping; Not guilty on 1 count of sexual assault. Prosecutor L. Krabbe.

December 10

William Foreman: Client charged with attempted sexual assault. Trial before Judge D'Angelo ended December 14. Client found guilty. Prosecutor H. Schwartz.

Gary J. Hochsprung: Client charged with aggravated DUI. Trial before Judge Dougherty ended with a hung jury December 14. Prosecutor J. Burkholder.

Louise Stark: Client charged with possession of narcotic drugs. Trial before Judge Dann ended December 16. Client found guilty. Prosecutor M. Troy.

December 14

David E. Brauer: Client charged with burglary and criminal trespass. Trial before Commissioner Trombino ended December 28. Client found guilty of burglary and not guilty of criminal trespass. Prosecutor V. Harris.

James A. Wilson: Client charged with possession of dangerous drugs, possession of narcotic drugs, possession of marijuana for sale, possession of drug paraphernalia and misconduct involving weapons. Trial *in absentia* before Judge Ryan ended December 16. Client found guilty of possession of dangerous drugs, possession of narcotic drugs and possession of marijuana for sale; Not guilty of possession of drug paraphernalia and misconduct involving weapons. Prosecutor P. Sullivan.

December 16

Stephen J. Whelihan: Client charged with possession of narcotic drugs. Trial before Judge Martin ended December 23. Client found not guilty. Prosecutor K. Rapp.

December 17

Gary J. Hochsprung: Client charged with child abuse. Investigator D. Tadiello. Trial before Judge Dougherty. Client found not guilty of class 4 child abuse; guilty of class 5 child abuse. Prosecutor T. Clark.

December 23

Donna L. Elm: Client charged with aggravated robbery. Trial before Judge Cole ended December 23 with Motion for Sanctions granted by judge and case dismissed without prejudice. Prosecutor M. Daiza.

November/December Sentencing Advocacy

MARGUERITE BREIDENBACH, Client Services Coordinator: Client pled guilty to an amended count of Attempted Theft, a class 4 felony, with no sentencing agreements. He had an extensive juvenile record culminating in an arrest for armed robbery in 1974. Remanded to Adult Court, he was sentenced to five to ten years in DOC. As an adult, he had several arrests with two additional convictions and commitments to DOC.

The presentence recommendation was prison. The Client Services Coordinator highlighted the mitigating factors and outlined the client's plans in a written report as well as in oral comments to the court. The judge placed the client on standard probation with 60 days jail.

Attorney: Shellie Smith.

MARGUERITE BREIDENBACH, Client Services Coordinator: Client pled no contest to Count I: Fraudulent Schemes and Artifices, a class 2 felony, and was found in automatic probation violation in two separate causes; Count II: Theft, a class 4 felony, and Unlawful Use of Transportation, a class 6 undesignated felony. The client had one additional prior felony for which he had served prison time in another state. The client had absconded from probation, previously had been found in violation of probation, and had a history of mental illness.

(cont. on pg. 10)

The presentence recommendation was prison on all counts. The Client Services Coordinator analyzed the presentence report, medical reports, and records from criminal justice agencies. The client's doctor, family members, and probation officer were consulted. The Client Services Coordinator's findings and conclusions were presented in a written report to the court. The judge reinstated the client on standard probation in both causes. On the new offense, the judge placed the client on standard probation with one month jail (soft) and with community service. The Adult Probation Department was ordered to supervise the client on a mental health caseload.

Attorney: Slade Lawson.

MARGUERITE BREIDENBACH, Client Services Coordinator: Client pled no contest to Aggravated Assault, a class 6 felony. He was found in automatic violation of probation for Possession of Marijuana, a class 6 felony. The client had five prior felony convictions and several prior grants of probation. The present offense involved a child and was similar to an incident which occurred five years ago. The presentence recommendation was aggravated prison terms to be served consecutively. A written report was submitted by the Client Services Coordinator to the judge, who sentenced the client to the presumptive term on one cause and an aggravated term on the other, concurrent.

Attorney: Larry Blieden.

MARGUERITE BREIDENBACH, Client Services Coordinator: Client charged with Aggravated Assault, a dangerous class 3 felony, which occurred in March, 1986. Client was found incompetent to stand trial after approximately 2.5 years in presentence incarceration. He spent approximately 4 years in the Arizona State Hospital before being returned to the superior court after gaining his competency. A doctor from the state hospital testified that the client was the most dangerous individual he had ever seen confined there. He recommended strongly against probation, but stated the client would be able to handle "strict supervision." However, he did not feel that a probation grant could qualify as the necessary strict supervision. The plea agreement left probation available. The Client Services Coordinator assisted Attorney Daphne Budge in developing a specific plan for community supervision and testified at the mitigation hearing. The judge placed the client on standard probation with 3 months jail. The probation officer was ordered to provide the court with reports of the client's performance every two months.

Attorney: Daphne Budge.

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State v. Alves
122 Ariz. Adv. Rep. 57 (CA 1, 9/22/92)

The defendant was put on probation and placed in the Shock Incarceration Program. He was dismissed from the program for lying to program officers. Defendant claims that the rule requiring that a probationer be given the terms and conditions of probation in writing also requires that he receive the written rules and regulations of any program imposed as a condition of probation. He contends that his probation cannot be revoked for failing to abide by rules that he did not receive in writing. Rule 27.7(c) provides that probation shall not be revoked for violation of a regulation which the probationer has not received a written copy. However, Rule 27 does not require that the rules and regulations of any program in which a probationer participates be furnished in writing. This does not leave probationers at the whim of program administrators. Any arbitrary termination from a program or termination for violations which a probationer is not and could not be expected to be aware of will not support a revocation of probation. The defendant in this case also received proper notice where the petition to revoke probation specified that he failed to abide by the terms of probation by failing to complete the Shock Incarceration Program.

[Represented on appeal by Helene F. Abrams, MCPD.]

State v. Bean
122 Ariz. Adv. Rep. 72 (CA 1, 9/29/92)

Defendant was convicted of custodial interference with two prior felony convictions and received an aggravated term of imprisonment. Defendant claims that the custodial interference statute violates the due process and equal protection clauses of the United States and Arizona Constitutions. A.R.S. Sec. 13-3102(b) provides that if a child is born out of wedlock, the mother is the legal custodian until paternity is established. Defendant claims that this gender-based distinction and the distinction between married and unmarried fathers violates equal protection. There is a compelling state purpose in preserving the child's custodial stability. The statutory presumption protects the best interests of the child until court proceedings can better determine the child's best interest. The statutory presumption does not violate equal protection.

(cont. on pg. 11)

Defendant also argues that he is similarly situated to the mother and entitled to protection equal to that provided to the child's mother. On the facts of this case, the defendant and the mother were similarly situated in a biological sense only. States are not foreclosed from recognizing differences in parents to the extent of commitment made by the fathers to the welfare of their children. The legislature was not unreasonable in concluding that the class of fathers who have taken no steps to establishing a parental relationship will contain a substantial proportion of fathers who are strangers to their children. A legal distinction drawn between classes of fathers on that basis is founded on sound public policy. Because the defendant failed to take any step to establish paternity, he is not similarly situated with other fathers.

Defendant claims that requiring that he establish paternity to gain custody or visitation rights violates his right to due process. The mere existence of a biological link does not create parental rights deserving of protection under the due process clause. The legislature has adopted a statutory scheme for an unmarried father to establish paternity and gain custodial or visitation rights with his child.

At trial, the court gave an instruction defining "legal custody." However, the instruction did not define all the rights afforded to a parent of a child, including visitation. Defendant did not object to the instruction given at trial and may not claim error absent fundamental error. Absent a determination of paternity, defendant did not have visitation rights to his child. There was no error in the court's custody instruction as given.

Defendant was sentenced to an aggravated term. The trial court found that the defendant's statements to the mother that she would never see the child again were an aggravating factor. Defendant contends that emotional harm is inherent in custodial interference and the court should not have considered his statements as an indication of cruelty or depravity. Cruelty, depravity and emotional harm are not elements of custodial interference. Emotional harm to the victim is an appropriate aggravating circumstance. An aggravated sentence based on those statements was not error.

[Represented on appeal by Helene F. Abrams, MCPD.]

State v. Hamilton
122 Ariz. Adv. Rep. 35 (CA 1, 9/17/92)

The police obtained a search warrant for a particular premise. The warrant also included the search of several identified people including "Jim, a black male." There was no further description of Jim. The search warrant was executed and four adults found on the premises. A search of the defendant, James Lawn, at the scene revealed cigarette rolling papers and marked money. Defendant filed a motion to suppress the evidence of the illegal search and the trial court granted the defendant's motion. The state appealed.

A search warrant must describe the person to be searched in detail adequate to identify him with reasonable certainty. To warrant reversal, the state must show that the trial court's ruling was clear and manifest error. In this case, there was absolutely no means of identifying the person to be searched beyond "Jim, a black male." The warrant lacked sufficient specificity and the trial court's ruling was not clear and manifest error.

State v. Rodarte
122 Ariz. Adv. Rep. 110 (CA 2, 9/17/92)

Defendant was convicted on charges of sale of marijuana and cocaine. Defendant moved for a directed verdict at trial on the cocaine charge on the grounds that the state failed to prove that a useable amount was involved. Sale or transfer of narcotic drugs does not require proof of a usable amount.

During jury selection, the prosecutor used peremptory strikes to remove the only two Hispanics from the venire panel. Defendant made a *Batson* motion which was denied. On appeal, defendant claims that the court erred in denying his motion. At trial, the prosecutor gave race-neutral reasons. He used a peremptory strike on one juror because he looked like he was "a little too close to the narcotics area." He appeared extremely bored and had no community ties. The prosecutor gave similar reasons for striking the other juror. Defendant claims that these reasons were insufficient. Defendant claims it was error for the court not to make specific findings, especially where the prosecutor's reasons are elusive or intangible. All that is required is that the explanation given by the prosecutor be based on something other than the race of the juror. The issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Defendant also argues that the prosecutor did not strike certain other venire members similarly situated to the two Hispanics who were struck. It is appropriate to consider a prospective juror's work history and marital status in exercising peremptory challenges. Division II also declines to follow *State v. Boston*, where Division I required a relationship between the reasons given and the issues at trial.

Having found that the reasons given were race neutral, the third prong of the *Batson* test is whether the court clearly erred in accepting the reasons given. Defendant contends that the trial judge's inquiry was superficial and did not focus upon the credibility of the prosecutor. The trial court is required to make a determination whether the defendant has met the ultimate burden of proving purposeful discrimination. No clear error has been shown.

Defendant also claims that his constitutional right to an impartial jury under the Arizona Constitution was violated. Art. II, Sec. 24 of the Arizona Constitution and the Sixth Amendment are comprised of virtually identical language. The impartial jury clause of the Arizona Constitution offers no greater protection that the same clause of the United States Constitution.

(cont. on pg. 12)

State v. Ruelas
122 Ariz. Adv. Rep. 9 (CA 1, 9/15/92)

Defendant got into a fight with his former girlfriend's new boyfriend and stabbed him. An hour-and-a-half after the stabbing, the victim spoke to the police at the hospital. He told them the defendant stabbed him and that he wanted to prosecute. The victim again spoke to the police 36 hours after the stabbing. The victim told the police at the second meeting that the defendant picked up a knife that was on the ground. The victim also stated that he was acting in self-defense when he punched the defendant in the face. The victim died 4 months after the stabbing. Defendant was tried and convicted of second degree murder. His first appeal was affirmed but the Arizona Supreme Court remanded it in light of *Idaho v. Wright*, 497 U.S. 805 (1990).

The first statement was not admissible as an excited utterance. The victim spoke to the police an hour-and-a-half after the stabbing. His statements were not spontaneous. He had time for reflection that could lead to fabrication. The police also testified that the victim was alert and awake but in considerable pain while making the first statement. Nothing showed that the victim was nervous, excited or in shock. This first statement was not admissible as an excited utterance.

The first statement was also not admissible as a dying declaration. The victim did not die until 4 months after the stabbing and did not make the first statement while believing his death was imminent. The victim never said he thought he was dying and the circumstances surrounding the statement did not indicate that the victim thought he was going to die.

Neither statement was admissible under the residual hearsay exception in Rule 804(b)(5) and was not admissible under *Idaho v. Wright*. The confrontation clause guarantees criminal defendants the right to confront their accusers. Public policy may override the confrontation clause if the declarant is unavailable and the declarant's statements bear adequate indicia of reliability. The indicia of reliability requirement may be satisfied if the statement falls within a firmly rooted hearsay exception or it is supported by a showing of particularized guarantees of trustworthiness. Neither statement falls within a firmly rooted hearsay exception. Particularized guarantees of trustworthiness may be shown from the totality of the circumstances but the relevant circumstances include only those that surround the making of the statement. Other evidence that has nothing to do with the making of the statements may not be used to support the admission of the statement. In the context of the confrontation clause, these hearsay statements are presumptively unreliable and inadmissible. They must be excluded absent a showing of particularized guarantees of trustworthiness under *Idaho v. Wright*. The state did not meet its burden of overcoming this presumption for either statement. In both statements, the victim had opportunity to reflect and motive to fabricate.

The state finally argues that the error in this case was harmless beyond a reasonable doubt. The state relies upon the testimony of the former girlfriend. While her testimony was strong evidence to refute the defendant's version of the events, it is not the kind of objective evidence that can be viewed as overwhelming. The previous opinion in *State v. Ruelas*, 165 Ariz. 326 (App. 1990) is vacated and the matter reversed and remanded for trial.

[Represented on appeal by Spencer D. Heffel, MCPD.]

State v. Steffy
122 Ariz. Adv. Rep. 86 (CA 1, 10/1/92)

Defendant was driving a stolen car. He had a blood alcohol content over .25% and was going over 80 mph in the wrong lane. He collided head-on with another car, killing one person and injuring two others. Defendant pled guilty to manslaughter and other charges and was sentenced to 12 years in prison.

At sentencing, the judge imposed over $54,000 in restitution. Defense counsel did not object to the amount of restitution and did not request a restitution hearing. By not raising the issue, the defendant waived the right to present the issue on appeal. However, the state did not argue waiver and the facts are undisputed. The court decides to address the issue.

One victim's insurance company specifically declined restitution. Defendant claims it was an abuse of discretion to order him to pay restitution when the victim does not request it. The fact that a victim does not request restitution does not change the court's obligation to order it. Restitution is not a claim which belongs to the victim, it is a remedial measure that the court is statutorily obligated to employ. Restitution to the insurance company was proper.

The trial judge also awarded nearly $10,000 restitution to the victim for unpaid medical bills. However, it is uncontested that the victim's insurer will pay some of these bills. Defendant argues that this will result in a windfall to the victim if both the insurer and the defendant reimburse him. The amounts ordered to be paid as restitution are for expenses already incurred but as yet unpaid. The order in this case will not result in the defendant paying any more restitution than the full economic loss. However, the potential exists that the victim will be paid twice, once by the insurer and once by the defendant. Defendant suggests resolving this by giving the victim an opportunity to reopen the case if the insurer does not pay the remaining amounts. The state suggests that the trial court should order the full amount of loss to the victim and leave the insurer with its civil remedies. The court rejects both suggestions. The court recommends that the trial judge award the insurer the amount it has already paid and award the victim his out-of-pocket costs as well as any unpaid medical expenses. If the insurer subsequently pays those unpaid medical expenses, it may under A.R.S. Sec. 13-804(i) petition the court to modify the manner in which defendant's payments are made so that the insurer is reimbursed rather than the victim.

State v. Womack
122 Ariz. Adv. Rep. 65 (CA 1, 9/29/92)

The defendant was riding a motorcycle which did not have a taillight. A police officer attempted to stop the motorcycle. The defendant sped away. The police officer activated his emergency siren and gave chase. The defendant stopped and was arrested. He later pled guilty to flight from a pursuing law enforcement vehicle, possession of marijuana and resisting arrest.

(cont. on pg. 13)

Defendant claims there was an insufficient factual basis for his conviction for resisting arrest. A person commits resisting arrest by intentionally preventing a police officer from effectuating an arrest by creating a substantial risk of causing physical injury to the police officer or another. A.R.S. Sec. 13-2508(a)(2). The statutory history indicates the statute was intended to prohibit assaultive behavior directed towards an arresting officer, not an arrestee's efforts to put as much distance as possible between himself and the officer. Defendant's conduct in fleeing was adequately prohibited by A.R.S. Sec. 28-622.01 [Flight from a Pursuing Law Enforcement Vehicle]. The defendant's conduct constitutes avoiding arrest, not resisting arrest.

The defendant's conduct in fleeing did not by itself place the officer in danger. The decision to pursue lies with the officer and not with the defendant. A.R.S. Sec. 28-624 requires the driver of authorized emergency vehicles to drive with due regard for the safety of all persons. As there is no record to the contrary, neither the officers nor the defendant placed anyone else in jeopardy. Although the dangers inherent in a high-speed chase through a residential area are obvious, the record is devoid of the required specific facts to show a proper factual basis. Finally, the factual basis given never showed any intent on the part of the officer to make an arrest. There was an insufficient factual basis for the defendant's guilty plea to resisting arrest and the matter is reversed. [*See also, dissent.*]

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State v. Tubbs
123 Ariz. Adv. Rep. 26 (CA 1, 10/8/92)

Defendant was charged with sale of narcotics. At trial, defendant requested a jury instruction on A.R.S. Sec. 13-3412 (A)(4)-(5), which exempts agents of police officers acting within the scope of their agency from prosecution. The trial court denied the request, stating that the defendant was a mere go-between and not an agent within the meaning of the statute.

The defendant procured crack cocaine for an undercover policeman without knowing his actual identity. Defendant argues that, as the officer's agent, he is statutorily exempt from prosecution. Defendant was acting on his own account and not for the purpose of assisting the police investigation. He was not an agent of the police officer. An agent cannot confer authority upon himself. The existence of an agency relationship depends on the intent of the principal. When the legislature enacted the exemption provisions of Sec. 13-3412, it intended to benefit only those individuals acting in concert with police authorities. The trial court correctly refused the instruction on Sec. 13-3412.

[Represented on appeal by James L. Edgar, MCPD.]

State v. Garcia
123 Ariz. Adv. Rep. 36 (CA 2, 10/8/92)

Defendant was convicted of second degree burglary and theft by control, with two prior convictions. He was sentenced to presumptive 7.5-year terms of imprisonment, to be served concurrently with each other but consecutively to a sentence in another case.

Defendant contends that the trial court erred in rejecting his request for a jury instruction that "mere possession of property not recently stolen does not give rise to any inference that the defendant in possession of the property stole the property." He characterizes the instruction as the converse of the inference that can be drawn under A.R.S. Sec. 13-2305(1). The inferences in Sec, 13-2305 apply to a prosecution under Sec. 13-1802(A)(5) for the crime of controlling property of another, knowing or having a reason to know that the property was stolen. No similar inferences apply to the other subsections of Sec. 13-1802. Since defendant was charged under Sec, 13-1802(A)1), the statutory inference, as well as its negative, are not applicable.

Defendant contends that prosecutorial misconduct occurred during closing argument. Defendant argues that the prosecutor commented inappropriately about a victim who did not testify. An objection to the comment was sustained before any information was revealed. The comment resulted in no prejudice to defendant since the jurors did not learn anything new from it. Defendant also argues that the prosecutor impermissibly vouched for the testifying victim's credibility. The victim first testified that he never met the defendant, but changed his testimony when his recollection was refreshed. The prosecutor's comment was merely an explanation of the witness's discrepancy in testimony and was not meant to place the government's prestige behind the victim. Defendant's contention of impermissible vouching was rejected. Defendant next contends that the prosecutor improperly commented on appellant's failure to testify. The prosecutor stated there was no explanation for the defendant's fingerprints on a telephone. The comment was general in nature and not directed at defendant's failure to take the stand. It was more in the nature of a comment on defendant's failure to present exculpatory evidence. Even assuming that comment was inappropriate, defendant was not deprived of a fair trial.

Defendant contends that the trial court erred in enhancing his sentence based on priors that, at the time they were established, were only guilty verdicts, not judgments of conviction. The word conviction is commonly understood to mean "the time when a person has been found guilty . . . even though there has been no sentence or judgment by the court." The legislature's intent in this regard is reflected in A.R.S. Sec. 13-607 where the finding of guilt is already considered a conviction. Such an interpretation is also in accord with Arizona's sentencing scheme. Thus, for purposes of the enhanced sentencing statutes, the term "conviction" includes a finding of guilt by the jury.

Defendant contends that the presumptive terms, ordered to be served concurrently but consecutively to the term imposed in another cause, are excessive. Sec. 13-708 presumes that sentences will be served consecutively to time remaining on another offense. The trial court found no reason to deviate from the statutory provision. There was no abuse of discretion.

(cont. on pg. 14)

O'Meara v. Superior Court
132 Ariz. Adv. Rep. 13 (CA 1, 10/1/92)

The defendants request review of the trial court's order denying their motion to dismiss the indictment and remand the case to the grand jury for a new determination of probable cause.

At the time of the impaneling of the grand jury, the county attorney attending the grand jury read to them 35 definitions set forth in A.R.S. Sec. 13-105, including the definition of "knowingly." Six weeks later the grand jury returned an indictment charging the defendants with one count of possession of marijuana for sale and one count of transportation of marijuana for sale.

The defendants argue that at the time the case was presented the state failed to reinstruct the grand jury as to the definition of "knowingly." The state argues that the definition of "knowingly" was read to the grand jury when it was impaneled. A defendant is entitled to due process in grand jury proceedings. It is unfair to the defendants for the state to speculate that the grand jury could remember the definition of a legal term read to it six weeks earlier during the open session of the grand jury. By failing to meaningfully instruct the grand jury as to the law to be applied and to draw the jury's attention to the requisite facts, the state failed in its obligation to present the case in a fair manner. The indictment is dismissed and case remanded for redetermination of probable cause.

Maricopa County Juvenile Action No. JV-121430
123 Ariz. Adv. Rep. 18 (CA 1, 10/8/92)

The juvenile in this matter was found delinquent based upon an act of child molestation. The juvenile contends that an act of child molestation can only be committed if the act is motivated by an unnatural or abnormal sexual interest in children. Because expert testimony in this case showed that such motivation is not present in a 13-year-old, then the evidence is insufficient to support the requisite intent for child molestation. Previous case law had adopted the "unnatural or abnormal sexual interest or intent with respect to children" standard. However, no case has analyzed this standard in view of the changes in legislation defining the crimes that have occurred since 1955. Particularly important is the legislative determination that a defense to a prosecution pursuant to Sec. 13-1420 exists where the defendant was not motivated by a "sexual interest." Thus, the intent necessary to commit the crime of molestation is that the actor be motivated by a "sexual interest" rather than an "abnormal or unnatural sexual interest."

The juvenile does not dispute that a touching occurred. Therefore, the juvenile's acts "by their very nature" manifest that he was motivated by a "sexual interest." The evidence supports the conclusion that the offense of child molestation occurred.

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State v. Romero
126 Ariz. Adv. Rep. 32 (CA 1, 11/19/92)

Defendant pled guilty to two counts of fraudulent schemes and artifices. The plea agreement called for a sentencing range of 7 to 14 years. Defendant received concurrent, aggravated sentences of 12 years for each offense. The trial judge stated that the defendant's extensive criminal history, her status as a threat to the community and the recommendation of the presentence investigator all constituted aggravating circumstances warranting an aggravated term.

The defendant's criminal history revealed numerous arrests, but only one felony conviction. The court held that a trial judge may not aggravate a sentence based on an arrest record with no evidence to show that the defendant committed any of the crimes. Neither may the trial judge use the defendant's status as a threat to the community as an aggravating factor. Lastly, it was error to use the recommendation of the presentence investigator as an aggravating factor. Standing alone, the report will not justify a variation from the presumptive sentence. A presentence investigator's recommendation is only an opinion.

The case was remanded to the trial court for resentencing.

[Represented on appeal by Lawrence S. Matthew, MCPD.]

State v. Brien
126 Ariz. Adv. Rep. 34 (CA 1, 11/19/92)

Defendant was charged with aggravated robbery with two prior felony convictions. The defendant and another man were accused of beating an 82-year-old man and taking his wallet. Defendant admitted to being present, but claimed that he was trying to prevent the crime.

Defendant argued that the trial court erred in admitting the hearsay testimony of one of the officers over defendant's objection. The officer testified that he had been approached by an unidentified male who told him that "two guys were beating up an old man." The trial court admitted the statement on the grounds that it was not hearsay because it was not offered for its truth, but only to show why the officer went to the crime scene. The statement must be relevant to an issue in the case when not offered for its truth. How the officer came upon the crime was irrelevant to the only disputed issue in the case which was the participation or nonparticipation of the defendant. The trial court erred in admitting the testimony as non-hearsay. However, the court will not overturn a trial court's ruling where it reaches a right decision, even when it does so for the wrong reason. The statement was admissible under the present sense impression exception to the hearsay rule. The declarant made the statement immediately after perceiving the event, which was still going on only 20 yards away.

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Defendant next argues that the trial court erred in admitting his prior convictions to impeach his credibility. He complains that the trial court failed to find that the probative value of the convictions outweighed their prejudicial effect as required by the rules of evidence. In this case, the trial court heard argument from both counsel regarding the probative value and the prejudicial effect of admitting the prior convictions. The court struck a balance by allowing reference to his prior crimes only as felony convictions along with their dates. Specific reference to the nature of the crimes involved was not allowed. The court balanced probative value against prejudice to strike the balance that it did.

Defendant complains further that the trial court compounded its error by precluding evidence of the nature of his convictions because this left the jury free to speculate. However, the trial court ruled that revealing the nature of the convictions would be prejudicial. In addition, the defendant neither objected to the court's ruling nor sought leave to explain the nature of his convictions. Thus, he has waived this issue on appeal.

Defendant claims that the trial court erred because it did not advise him of the constitutional rights he waived when he admitted his prior convictions. The record reveals that the defendant voluntarily admitted having two prior felony convictions while testifying at trial. The rules do not require the Rule 17 procedures when a defendant admits prior convictions while testifying at trial.

The judgment and sentence are affirmed.

[Represented by James R. Rummage, MCPD.]

State v. Sanchez
126 Ariz. Adv. Rep. 10 (CA 1, 10/27/92)

Defendant missed his court appearance after being charged with DUI. He later submitted himself to the judge to explain his failure to appear. The court proceeded with the defendant's arraignment and advised him that he was in custody. Defendant was also informed that he would have to post bail before he could leave. Defendant admits he knew he was not free to leave, but proceeded to walk out of the courtroom. He was later taken into custody and charged with third degree escape. Defendant pled guilty to escape. Defendant now claims that the factual basis for the plea was insufficient because there was no physical restraint. He contends that he was never under arrest and therefore, could not be guilty of escape.

Under A.R.S. Sec. 13-2501(3), custody may mean actual or constructive restraint pursuant to an on-site arrest or court order. The fact of this case establish that the judge placed the defendant in custody and under arrest by using constructive restraint. The court distinguished *State v. Sanchez*, 145 Ariz. 313, 701 P.2d 571 (1985) on the basis that the case involved a law enforcement officer and not a judge. Constructive restraint may be achieved by court order made in open court when a defendant who has submitted himself to the authority of the court understands that the judge has ordered him into custody. Should the defendant decide to leave in defiance of the order, he may properly be charged with escape.

The judgment of the trial court is affirmed.

[Represented on appeal by Stephanie L. Swanson, MCPD.]

State v. Moore
126 Ariz. Adv. Rep. 29 (CA 1, 11/17/92)

Defendant was an employee of a convenience market on an Indian reservation. He pled guilty to one count of theft which took place at the market. The convenience market was a joint venture between the tribe and a Colorado corporation. Defendant, a non-Indian, now argues that the state of Arizona has no jurisdiction because the crime occurred on a reservation.

The court concludes that Arizona has jurisdiction because the crime did not significantly involve the interests of the Indian tribe. The Colorado corporation contributed the financing and construction of the market, while the tribe's only contribution was the grant of the right to operate a convenience market on the reservation. The agreement provides that the corporation has the sole power to manage the market and is entitled to the lion's share of the net profits. In contrast, the tribe has no management authority and receives only a small percentage of the net profits.

Generally, federal courts have jurisdiction over non-Indians who commit crimes against Indians on Indian reservations. States have exclusive jurisdiction over non-Indians who commit crimes against other non-Indians on Indian reservations. Where both Indians and non-Indians are involved either as defendants or victims, a court should ascertain whether an Indian was involved in the criminal incident in a significant way. In this case, the tribe did not have a substantial interest in the joint venture. Therefore, the defendant's crime did not significantly affect tribal interests, giving Arizona jurisdiction over the defendant.

The trial court's ruling is affirmed. ^

Personnel Profiles

Frances Dairman returned on January 11 to work as our Office Aide in Trial Group C, replacing Garilu Merrill who has resigned. Frances will work part-time while she continues her full-time schedule of classes at ASU (majoring in Microbiology).

Norma Muñoz joined our office on January 19. She previously was employed as a clerk in the South Phoenix Justice Court. Norma is fluent in Spanish and now works in our Pretrial Services.

Crystal Thurber started work as an aide in our Records Division on December 28. Kristie (with a "K") is fluent in Spanish and serves as co-receptionist in the Luhrs Central Building. She previously worked in retail.

Vera Villa began her employment as our Group C/Mesa Juvenile Office Aide on January 19. She spends each morning at Trial Group C and each afternoon in Mesa Juvenile Records. Vera also attends evening classes at Mesa Community College, seeking a degree in Computer Information Systems. She has prior administrative work experience. ^

Maricopa County Public Defender
Training Schedule

DATE & TIME	SUBJECT	FACULTY
02/11/93 1:00-4:30 Training Facility	*Gangs (cont.): Ritual Abuse & Adolescent Satanism*	JPO Hellen Carter
02/25/93 2:00-4:00 Training Facility	*PPD & Gangs, Part II*	Sgt. Paul Ferrero, PPD
02/26/93 10:00-4:00 Supervisors Auditorium	*HAVE YOU LOST YOUR APPEAL? Strategies For Winning At Trial Or On Appeal*	Helene Abrams, Carol Carrigan, Brent Graham, Jim Kemper, Charles Krull, Paul Prato and Ed Bassett
03/11/93 2:00-4:00 Training Facility	*AIDS & the Criminal Justice System*	Dr. Lynne Kitei, Cynthia Cheny and Christopher Johns
03/19&20/93 9:00-4:30 9:00-12:45 Supervisors Auditorium	*Indian Crimes Seminar*	Federal and State Practitioners including 9th Circuit Court of Appeals Judge William Canby and Mara Siegel
*05/5-8/93 Training Facility	*First Annual MCPD Trial College*	To Be Determined
*05/28/93 Supervisors Auditorium	*Criminal Law Ethics*	Robert W. Doyle and Panel
*06/25/93	*DUI Seminar*	To Be Determined

* Tentative dates.

Bulletin Board

Speakers Bureau

Braving "enemy" territory, James Cleary will speak at APAC's (Arizona Prosecuting Attorneys Council) seminars on 1992 Law. On February 05, he will be the closing speaker at their Phoenix seminar and will present the defense perspective. On February 26 he will speak at their Tucson session.